

STATE OF MICHIGAN
COURT OF APPEALS

LEONTEEN MONTGOMERY,

Plaintiff-Appellant,

v

KEITH COHENS,

Defendant,

and

STATE FARM INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

April 10, 2012

No. 303071

Wayne Circuit Court

LC No. 10-010347-NI

Before: WILDER, P.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order dismissing her action with prejudice as a discovery sanction under MCR 2.313. Because the record lacks a sufficient indication that the trial court considered the available range of discovery sanctions, we reverse and remand.

Plaintiff's claim arose from a May 2010 automobile collision. In September 2010, plaintiff filed a complaint against defendant State Farm Insurance Company and defendant Cohens, who was the driver of the other car.¹ Against State Farm, plaintiff alleged breach of contract for failure to pay uninsured or underinsured motorist benefits. In October 2010, State Farm (hereafter "defendant") answered the complaint and served on plaintiff interrogatories and requests for production of documents. Plaintiff failed to reply to these discovery requests within the time allotted by the court rules. The parties then stipulated to the entry of an order that required plaintiff to provide the requested discovery.

¹ Defendant Cohens is not a party to this appeal and is apparently no longer a party in the underlying lawsuit.

The trial court entered the stipulated order on December 6, 2010, compelling plaintiff to respond completely to defendant's interrogatories and requests for production of documents by December 20, 2010. Plaintiff again failed to provide the discovery responses. In January 2011, defendant filed a motion to dismiss plaintiff's complaint. On January 28, 2011, less than six months after plaintiff filed her complaint, the trial court granted defendant's motion and dismissed the matter with prejudice. Plaintiff filed a motion for reconsideration, which the trial court denied.

This Court reviews for an abuse of discretion a trial court's imposition of discovery sanctions. *Linsell v Applied Handling Inc*, 266 Mich App 1, 21; 697 NW2d 913 (2005). We examine the record for an indication that the trial court considered all options before the court selected a just and proper sanction. See *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). The factors for the trial court's consideration in selecting a sanction include:

(1) Whether the violation was willful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the defendant; (4) actual notice to the defendant of the witness [if the issue involves witness lists] and the length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of plaintiff's engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect; and (8) whether a lesser sanction would better serve the interests of justice. [*Id.* at 32-33.]

A trial court abuses its discretion when the outcome of the sanction falls outside the range of principled outcomes. See *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

In this case, the record contains nothing from which we can glean whether the trial court weighed any factors or considered any sanctions other than dismissal with prejudice. A dismissal with prejudice is a severe sanction usually reserved for egregious conduct. See *Brenner v Kolk*, 226 Mich App 149, 163; 573 NW2d 65 (1997) ("Dismissal is a drastic step that should be taken cautiously. Before imposing such a sanction, the trial court is required to carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper.") Although MCR 2.313(B)(2)(c) allows a trial court to dismiss an action for failure to obey a discovery order, the rule also identifies other sanctions that may be appropriate. Here, the record indicates that at the time of the hearing on defendant's motion to dismiss, the trial court had scant information concerning circumstances that may have contributed to plaintiff's failure to comply with the discovery order. Counsel informed the court that plaintiff had appeared at her deposition, but that the deposition ended prematurely. Counsel also informed the court that plaintiff had considered but had rejected the possibility of dismissing her complaint. However, the trial court did not reference these matters in rendering its decision.

Given the dearth of verified information in the record concerning whether plaintiff's conduct was willful and whether any other factors contributed to the failure to comply with the discovery order, we conclude that the trial court abused its discretion in dismissing the action with prejudice. The record before us supports a dismissal without prejudice or a lesser sanction. On remand, the trial court may hold an additional hearing to obtain more complete and verified

information about the circumstances of the failure to comply with the discovery order and about other factors germane to the determination of an appropriate sanction. The court may then consider which sanction, including dismissal with prejudice, is appropriate under the totality of the circumstances. Cf. *Shawl v Spence Bros, Inc*, 280 Mich App 213, 239; 760 NW2d 674 (2008) (trial court should consider totality of circumstances in deciding whether to set aside a default judgment).

Having determined that the dismissal with prejudice must be reversed, we need not consider whether the trial court erred by denying plaintiff's motion for reconsideration.

Reversed and remanded. No taxable costs to either party. We do not retain jurisdiction.

/s/ Kurtis T. Wilder

/s/ Peter D. O'Connell

/s/ William C. Whitbeck